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OCTOBER TERM, 1979

NO. 79-1033

WEBB'S FABULOUS PHARMACIES, INC.,
AND ECKERD'S OF COLLEGE PARK, INC., et al
Appellants,

vs.

ARTHUR H. BECKWITH, JR.,
CLERK OF THE CIRCUIT COURT,
AND SEMINOLE COUNTY, FLORIDA,
Appellees.

On Appeal from the
Supreme Court of the State of Florida

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

JURISDICTION

This Court noted probable jurisdiction in this case on March 17, 1980, under 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether Section 28.33, Florida Statutes, violates the Fifth and Fourteenth Amendments and Article IV, §4, of the United States Constitution to the extent it provides that interest earned on funds during the period of their deposit in a Florida Circuit Court registry shall be deemed income of the office of the Circuit Court Clerk.

STATUTE INVOLVED

The Statute involved, Section 28.33, Florida Statutes, is set out in full in Appendix B of the Brief for the Appellants.

STATEMENT OF THE CASE

In this Brief, ARTHUR H. BECKWITH, JR., Circuit Court Clerk for Seminole County, Florida, will be referred to as "Circuit Court Clerk" and HARVEY M. ALPER, as Receiver, will be referred to as the "Receiver." References to the Appendix shall be in the same manner as in the Brief for the Appellants.

Seminole County, Florida, and the Circuit Court Clerk perfected an appeal to the Florida Supreme Court from the final orders of the Circuit Court, Eighteenth

Judicial Circuit, in and for Seminole County, Florida, entered on July 24, 1978 (34a-35a) and August 23, 1978 (40a-41a). The orders collectively held that the Circuit Court Clerk is not entitled to interest earned on monies in interpleader deposited in the registry of the Circuit Court in this action, such interest to be paid to the Receiver, and that Section 28.33, Florida Statutes (hereinafter referred to as Section 28.33), and Chapter 73-282, Laws of Florida, are unconstitutional "to the extent that the provisions thereof pertain to private monies held in the registry of the court. . . ." The Florida Supreme Court reversed, holding that interest earned pursuant to Section 28.33 should be disposed of pursuant to that statute's direction. *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (1979).

As background, Eckerd's of College Park, Inc. (Eckerd's), entered into an agreement to purchase the assets of Webb's Fabulous Pharmacies, Inc. (Webb's). Pursuant to Section 676.106(4), Florida Statutes, Eckerd's then filed a Complaint of Interpleader in the Circuit Court below, interpleading Webb's and Webb's creditors as defendants and tendering the purchase price of $1,812,145.77 into the Circuit Court registry. Subsequently, on its own motion, the Circuit Court appointed the Receiver to determine the number and amount of claims filed against the monies in interpleader and to investigate the establishment of an account or accounts in which to deposit the monies (7a-9a).

The Circuit Court, on Eckerd's motion, then ordered that the tendered purchase price be paid to the Circuit Court Clerk to be deposited in "an assignable

interest bearing-account at the highest rate of interest" and reserved ruling on whether the interest earned on the monies in interpleader would accrue to the benefit of the Circuit Court Clerk's office (4a-5a). The monies were accordingly delivered to the Circuit Court Clerk (6a), who in turn deposited the monies in interest-bearing accounts.

Upon the Receiver's motion (10a-13a), the Circuit Court ordered that the monies in interpleader be delivered by the Circuit Court Clerk from the registry to the Receiver and directed the Circuit Court Clerk to continue to hold the accrued interest from the monies in the registry until a determination of the rightful party to receive the interest could be made (14a-15a). The Circuit Court Clerk subsequently paid the monies in interpleader to the Receiver, minus fees and amounts previously paid out.

The Receiver then filed a motion to direct the Circuit Court Clerk to pay to the Receiver the amount of interest accrued from the monies in interpleader while deposited in the Circuit Court registry (22a-34a). Following submissions of memoranda and a hearing on the matter, the Circuit Court entered the orders that the Appellees here appealed to the Florida Supreme Court (34a-35a, 40a-41a).

It is from the decision of the Florida Supreme Court reversing the Circuit Court that the Appellants have perfected this appeal.

SUMMARY OF ARGUMENT

A definition of "property" protected by the Fifth and Fourteenth Amendments of the United States Constitution has evolved in the decisions of this Court and lower federal court decisions which make clear that the Constitution itself does not create property. Rather, the property interests which the Fifth and Fourteenth Amendments protect are those interests that a person has already acquired pursuant to existing rules or understandings that stem from an independent source such as state law. Unilateral expectations do not constitute property. See *Fox River Paper Co. v. Railroad Commission,* 274 U.S. 651 (1927); and *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Applying this definition here, the interpleader claimants below can point to no existing rule or understanding that legitimately entitles them to the disputed interest. In fact, the general rule is that, in the absence of a statute to the contrary, interest is not allowable for the period during which disputed funds are deposited in court pending the outcome of litigation as to their ownership. 45 *Am.Jur.2d* Interpleader §40 (1969). Thus, if the claimants have any right to the interest earned on the interpleader funds, they must look to state statutes. However, Section 28.33, the only general state statute that provides for the investment of funds deposited in a circuit court registry, also provides that the interest earned shall be deemed income of the Circuit Court Clerk's office. The attempt by the Receiver to take advantage of the benefit of Section 28.33 (i.e., the interest), while challenging this disposition requirement not only violates the express

terms of Section 28.33, but contradicts this Court's doctrine that one may not seek the benefits of a statute while attacking the constitutionality of its conditions. See *Fahey v. Mallonee,* 332 U.S. 245 (1947); and *Arnett v. Kennedy,* 416 U.S. 134 (1974). The Florida Supreme Court was correct, therefore, in holding that the interpleader claimants below have no property right to the disputed interest.

The fact that the interpleader claimants have no property right to the disputed interest also answers the Receiver's claim that Section 28.33 violates the guaranty clause of Article IV, Section 4, of the Federal Constitution. The disposition of the interest mandated by Section 28.33 cannot be an invalid "tax" on the utilization of the Circuit Court registry if the interest is not the property of the claimants. In addition, Section 28.33 obviously does not so destroy the state judiciary or materially curtail its powers as to create an "anti-republican" form of government in Florida. Thus, Section 28.33 has effected no violation of Article IV, Section 4. See *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223 (1973); and *State v. Lehtola,* 55 Wis.2d 494, 198 N.W.2d 354 (1972).

ARGUMENT

I. INTRODUCTION

The Florida Supreme Court essentially determined in its decision below that under Florida law, interest earned on funds deposited by private litigants in the registry of the Circuit Court (trial court) is not the "private property" of the person or persons ultimately

receiving the principal. This determination was based in part on the Court's express recognition that, in the absence of Section 28.33, there would exist no requirement in Florida law that interest be earned on registry deposits. 374 So.2d at 953.

Also, in response to the Receiver's argument that the disposition of interest earned on registry deposits mandated by Section 28.33 violated the "Separation of Powers" doctrine of the Florida Constitution (a disposition which the Receiver now claims is also "anti-republican"), the Florida Supreme Court concluded that the Florida Legislature has the right to decide that interest earned on "funds held by a public officer in a public account accrue to the benefit of all the people." 374 So.2d at 953.

The Appellees maintain that these determinations and conclusions of the Florida Supreme Court are imminently correct and should be sustained.

II. FIFTH AND FOURTEENTH AMENDMENTS

The Receiver first asserts that Section 28.33, to the extent it applies to interest earned on registry deposits made by private litigants, and particularly on the interpleader monies deposited in the Circuit Court below, effects a deprivation or taking of private property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. However, this assertion merely begs the more fundamental issue involved in this appeal: Is the interest here in dispute indeed constitutionally protected "private property?"

A. Definition Of "Property"

In *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651 (1927), the Wisconsin Supreme Court had determined that under state law, certain riparian landowners had no property right in the water power created by damming a navigable river as long as the state withheld its consent to the construction or maintenance of the dam. On appeal, the landowners claimed that the state's denial of consent deprived them of their property without due process of law in violation of the Fourteenth Amendment. In response this Court first observed that, considering established rules of property of the state and earlier state judicial decisions, there was no basis upon which to find that the Wisconsin Supreme Court adopted its view in order to evade the constitutional issue. The opinion then concluded as follows:

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine . . . It is for the state court in cases such as this to define rights in land located within the state, and *the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent.*
>
> *We accept as conclusive the state court's view of the nature of the rights of riparian owners.* We therefore find in the refusal of the

commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth Amendment." 274 U.S. at 657. (emphasis supplied)

See also *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), likewise holding that there was no taking of property in violation of the Fifth Amendment where consistent with applicable state law, the plaintiff, a riparian power company, had no property right in the highwater level of a navigable river.

More recently, in *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court held that a non-tenured assistant professor had not been deprived of an interest in property in violation of the Fourteenth Amendment when he was terminated without an opportunity to be heard. According to the decision:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits. Those interests — property interests — may take many forms.
>
> . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have *a legitimate claim of entitlement to it*. . . .
>
> *Property interests, of course, are not created by the Constitution.* Rather, they are created and

> their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." 408 U.S. at 576-577.

See also *Perry v. Sindermann,* 408 U.S. 593 (1972); *Arnett v. Kennedy* 416 U.S. 134 (1974), in which the plurality held that a statutory grant of a substantive property interest in employment may be limited by statutorily prescribed procedural safeguards; and *Leis v. Flynt,* 439 U.S. 438 (1979), holding that out-of-state lawyers have no constitutionally protected property right stemming "from an independent source such as state law," to appear in the court of a state where they are not licensed to practice.

The *Roth* definition of "property" for purposes of the Fifth and Fourteenth Amendments has been applied by lower federal courts in various contexts. For example, in *United States v. Richards,* 583 F.2d 491 (10th Cir. 1978), the defendant was convicted of selling sparrow hawks in violation of federal regulations prohibiting the sale of such birds, "whether or not raised in captivity." The defendant had acquired and raised the hawks prior to adoption of the federal regulations under state permits authorizing the collection of the birds for certain scientific purposes and allowing the sale of "young produced from captive birds." The Court held that these state permits granted at most a partial property interest which did not encompass all usual property rights. Thus, citing *Roth* for the proposition that the Fourteenth Amendment safeguards only

property "already acquired," the Court rejected the defendant's claims of unconstitutional deprivation of property. 583 F.2d at 496.

Similarly, in *United Land Corporation of America v. Clarke,* 613 F.2d 497 (4th Cir. 1980), a land developer was denied a soil erosion permit by county officials due to an emergency county moratorium on the issuance of such permits adopted after the developer had applied. The moratorium was imposed prior to the expiration of the forty-five day period during which the county officials were required by pre-moratorium regulations to approve or disapprove the application. In response to the developer's argument that denial of the permit violated the Fourteenth Amendment, the Court found that the developer had no protectible property interest in the permit at the time the moratorium was imposed because the prescribed forty-five day period had not run on its application. According to the Court, the allegations of the developer's complaint fell short of establishing that either state law or county ordinance entitled the developer to an erosion control permit. 613 F.2d at 501. Thus, the developer possessed no property right to which the Fourteenth Amendment could apply.

Also, in *Rodic v. Thistledown Racing Club, Inc.,* 615 F.2d 736 (6th Cir. 1980), the plaintiff had been permanently barred by racing officials from entering a horsetrack where he had been engaging in objectionable activities. The plaintiff claimed that his expulsion from the track deprived him of a property interest in violation of the Fourteenth Amendment. In its decision the Court first recited language in *Roth* to the effect that "the Constitution does not create property interest" and that

protected interests must "stem from an independent source such as state law." It then observed that the plaintiff had revealed no state law or other "independent source" granting him a right of admission to the horsetrack. Accordingly, the Court denied the plaintiff's constitutional claim. 615 F.2d at 739-740.

Finally, in *Moore v. Johnson,* 582 F.2d 1228 (9th Cir. 1978), domicilliary care patients in a Veterans Administration facility claimed they had a property interest protected by the Fifth Amendment not to be relocated to another care facility. Again, however, the court cited *Roth* for the proposition that, in order to qualify as a constitutionally protected property interest, the plaintiffs had to have more than a "unilateral expectation." They had to have "a legitimate, objectively justifiable claim to the benefits of the governmental program," the source of which claim "is not the Constitution but rather the acts of the sovereign, state or federal, manifested in legislation, rules, or customs." 582 F.2d at 1233. Finding that the plaintiffs' claims of entitlement were not based on any such sovereign act, the Court ruled that no violation of the Fifth Amendment had occurred. See also *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438 (2nd Cir. 1980); and *Ledford v. Delancey,* 612 F.2d 883 (4th Cir. 1980).

B. Application Of Definition To The Disputed Interest

The definition of "property" for purposes of the Fifth and Fourteenth Amendments that has thus evolved makes clear that those amendments do not

themselves create property interests. Rather, protected property interests are those interests that a person has already acquired pursuant to existing rules or understandings that stem from an independent source such as state law. Protected property interests do not include unilateral expectations or abstract needs or desires.

The Florida Supreme Court's decision below that the disputed interest is not the private property of the interpleader claimants is consistent with this definition. First, the Florida Supreme Court's decision comports with the general rule that the award of interest is in derogation of the common law and should be refused except in such cases as come within enabling legislation. See 45 *Am.Jur.2d* Interest §34 (1969); and *Phillips Petroleum Co. v. Adams,* 513 F.2d 335 (5th Cir. 1975), *cert. denied,* 423 U.S. 930. Thus, it is ordinarily held that, in the absence of a statute to the contrary, interest is not allowable for the period during which disputed funds are deposited in court pending the outcome of litigation as to their ownership. Interest is not recoverable against the party depositing the funds in court, nor against the unsuccessful litigant or the mere depository of the funds. See 45 *Am.Jur.2d* Interpleader §40 (1969); Annot., 15 *A.L.R.2d* 473 (1951); and 18A *Fla.Jur.* Interpleader §21 (1971). This rule appears to be a logical extension of the concomitant proposition that none of the adverse claimants has any legal or beneficial right to disputed funds deposited in court until the funds are paid out. See 23 *Am.Jur.2d* Deposits in Court §6 (1969). If no such legal or beneficial right exists, then there can be no legitimate entitlement by any of the adverse claimants to interest on those funds in the

absence of statutory authority to the contrary. Cf. *Sherrell v. Shepard's Administrator,* 19 Fla. 300 (1882); *Morton v. Ansin,* 129 So.2d 177 (Fla. 3rd DCA 1961); and *Behm v. Division of Administration,* 366 So.2d 828 (Fla. DCA 1979).

In addition, the Florida Supreme Court's decision conforms to Florida statutory law. There is no general state statute other than Section 28.33 that relates to interest earned on funds deposited in a Florida Circuit Court registry. Moreover, while Section 28.33 requires that interest be earned on such funds, it also expressly requires that the disposition of that interest be to the office of the appropriate Circuit Court Clerk. The Florida Supreme Court's decision gives effect to both of these requirements. The Receiver, however, would have this Court give effect to the former (i.e., the interest requirement), but not the latter (i.e., the disposition requirement).

Such an application of Section 28.33 would not only violate the express terms of that statute, but would contradict this Court's doctrine that one may not seek the benefits of a statute while attacking the constitutionality of its conditions. As stated in *Fahey v. Mallonee,* 332 U.S. 245, 255 (1947),

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' *United States v. San Francisco,* 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288,

> 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' "

Again, in *Arnett v. Kennedy,* supra at 152-154, it was observed that, in order to approve the discharged federal employee's Fifth Amendment claim to a full adversary hearing, this Court would have been compelled to ignore the "unmistakable clarity" of the federal act involved by holding that the act granted federal employees

> ". . . not merely that which Congress had given them in the first part of a sentence [i.e., no dismissal without 'cause'], but that which Congress had expressly withheld them in the latter part of the same sentence [i.e., a full adversary hearing]. Neither the language of the Due Process Clause of the Fifth Amendment nor our cases construing it require any such hobbling restriction on legislative authority in this area."

It is thus apparent that the Florida Supreme Court overlooked no established rule of law or state statute that establishes the present legitimate entitlement of the interpleader claimants below to the disputed interest. See *Fox River Paper Co. v. Railroad Commission,* supra.; and *Roth,* supra. The Court rightfully did not consider the Constitution or the claimants' unilateral expectations as a source of their claimed property right. See *Roth,* supra. It also correctly declined to approve the claimants' attempt to take advantage of the benefits of Section 28.33 — the only "sovereign act" that could serve as the "independent

source" of their alleged property right — while attacking the constitutional validity of that statute's limitations. See *Fahey v. Mallonee,* supra. Thus, the Florida Supreme Court's determination that the claimants' alleged property right is nonexistent should be accepted as conclusive by this Court for purposes of the Fifth and Fourteenth Amendments.

C. Other Jurisdictions

As previously stated in the Appellee's Motion to Dismiss or Affirm, the cases cited by the Receiver from other jurisdictions are, for the most part, consistent with the Florida Supreme Court's decision below in the sense that they too followed the applicable legislative scheme. Thus, for example, in *Metropolitan Water Dist. v. Adams,* 32 Cal.2d 620, 197 P.2d 543 (1948), the California Supreme Court construed that state's Depository Act as requiring the return to the water district of interest earned on funds deposited by it in court during condemnation proceedings. The Act provided that interest earned on funds be paid to the "public or municipal corporation represented by the officer making such deposit." The Court determined that the water district was that "corporation." In its decision, the Court also recited the general rule, stated above, that "[i]n the absence of a statute which, in effect, accretes sums to amounts deposited . . . no claim would arise for return of other than the original deposit." 197 P.2d at 548. See also *Board of Law Library Trustees v. Lowery,* 67 Cal.App.2d 480, 154 P.2d 719 (1945); and *Ponoma City School District v. Payne,* 9 Cal.App.2d 510, 50 P.2d 822 (1935).

On the other hand, where no applicable legislative scheme existed for the disposition of interest earned on funds deposited in court, the courts have generally allowed the interest to flow with the principal. Thus, for example, in *Bordy v. Smith,* 150 Neb. 272, 34 N.W.2d 331 (1948), interest had been earned on the proceeds from county tax foreclosure bids while the proceeds were being held by the court clerk. There was no statutory direction as to the appropriate disposition of the interest, so the Nebraska Supreme Court relied on the general rule that "where there is no statute to the contrary . . . interest becomes a part of the fund by whose investment it was produced," and awarded the interest to the county. 34 N.W.2d at 334. See also *Kiernan v. Cleland,* 47 Ida. 200, 273 P. 938 (1929); *Drainage Dist. No. 2 v. Ada County,* 38 Ida. 778, 226 P. 290 (1924); and *State v. McFetridge,* 84 Wis. 473, 54 N.W. 1 (1893).

Likewise, in *United States v. MacMillan,* 253 U.S. 195 (1920), this Court was concerned with the proper disposition of interest earned on fees and emoluments received by a federal district court clerk. Consistent with its previous decision in *United States v. Mason,* 218 U.S. 517 (1910), in which such fees and emoluments were found to be amounts allowed a clerk "for his compensation and office expenses under the statutes defining his rights and duties," this Court held that the interest in question was not subject to general federal laws relating to public monies of the United States. Although not an issue in the case because no claim of ownership was being made by the government, the Court noted that private litigants could apply under applicable rules of court for the return of any interest

earned on their funds while deposited with the clerk. 253 U.S. at 205.

Even the cases cited by the Receiver that appear most inconsistent with the Florida Supreme Court's decision below may be explained in this manner. The courts in those cases merely determined that, under the laws of the states involved, the litigants had a protected property right in the interest accrued on the deposited funds. Thus, for example, the Texas Supreme Court in *Sellers v. Harris County,* 483 S.W.2d 242 (Tex. 1972), deemed it very significant that the deposited funds were statutorily denominated "trust funds," thus implying a fiduciary duty on the part of the court clerk to account for the interest to the litigants.

Likewise, in *University of South Carolina v. Elliot,* 248 So.C. 218, 149 S.E.2d 433 (1966), the South Carolina Supreme Court held that, under general principles of fiduciary relationships, the interest earned on condemnation funds deposited with the clerk of court of Richland County should be refunded to the University along with the principal unless the statute involved "has the effect of transferring ownership thereof to Richland County." The Court then determined that the statute did not have that effect since the condemnation funds were not "public funds" within the purview of the statute. See also *Southern Oregon Co. v. Gage,* 100 Or. 424, 197 P. 276 (1921). Also, in *McMillan v. Robeson County,* 262 N.C. 413, 137 S.E.2d 105 (1964), the North Carolina Supreme Court did not make any substantive determinations as to entitlements to the interest earned on amounts held by the court clerk, but emphasized portions of the controlling statute which appeared to

grant certain potential claimants a fiduciary interest in those amounts and to authorize any valid claims with respect to the interest.

As can be seen, therefore, the Florida Supreme Court's decision below is in accordance with the cases from other jurisdictions in that it gave effect to the clear legislative scheme for disposition of the disputed interest earned under Section 28.33. The fact that there is such a legislative scheme in Florida precludes an application of the general rule that, in the absence of a statute to the contrary, interest flows with the principal. Also, the fact that Florida's legislative scheme is different from those applicable in other states does not render it any less valid. See *Fox River Paper Co. v. Railroad Commission,* supra at 657. If anything, the variety of statutory provisions and judicial interpretations of those provisions emphasize that the determination of whether interest earned on funds deposited in court is "property" protected by the Fifth and Fourteenth Amendments, is truly a matter of state law.

III. REPUBLICAN FORM OF GOVERNMENT

The Florida Supreme Court's determination that the disputed interest is not the private property of the interpleader claimants below should also resolve the Receiver's claim that Section 28.33 violates the Federal Constitution's guarantee of a republican form of government. U.S. Const. Art. IV, §4. Since the interest is not the property of the claimants under state law, there can be no valid claim that the disposition of that interest prescribed by Section 28.33 imposes a "tax" on their utilization of the Circuit Court registry.

Moreover, as admitted by the Receiver in his Brief (p. 40), the proper distribution of power among state governmental organs is ordinarily a matter for the state itself to decide. In Florida, the appropriate separation of power between the legislature and the judiciary is established in the State Constitution, and the state judiciary has very jealously guarded its authority. See Fla. Const. Art. II, §3, Art. III and Art. V; *Johnson v. State,* 336 So.2d 93 (1976); *Simmons v. State,* 160 Fla. 626, 36 So.2d 207 (1948); *State v. Young,* 238 So.2d 589 (1970), *appeal dismissed,* 400 U.S. 962; and *Farabee v. Board of Trustees Lee County Law Library,* 254 So.2d 1 (Fla. 1971). (The latter two cases upheld certain statutory assessments connected with litigation.)

The most exhaustive judicial treatment of the Federal Constitution's guaranty clause occurred in *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223 (1973). There, the appellants challenged an amendment to the Kansas Constitution allowing the state governor to reorganize the executive branch, subject to legislative veto. In response, the Kansas Supreme Court first reviewed extensively the history of that clause, ending with a quote from James Madison to the effect that it is only where "the whole power of one department is exercised by the same hands which possess the whole power of another department, [that] the fundamental principles of a free constitution are subverted. *(Federalist* Nos. 43, 47)" 511 P.2d at 243. The Court then found that although the challenged amendment did vest in the governor a limited share of legislative power to make law, it had not destroyed the legislative and executive departments or materially curtailed their powers or authority. Thus, the Court found no violation of the guaranty clause.

Likewise in *State v. Lehtola*, 55 Wis.2d 494, 198 N.W.2d 354 (1972), the Wisconsin Supreme Court found no merit in the argument that a district attorney as an officer of the executive branch, was performing a judicial function in issuing an information upon which a person could be tried for a crime. In any event, the Court stated that

> "Some mixing of powers is permissible and the field of administrative law is also an example. See *Highland Farms Dairy v. Agnew* (1937), 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835. Unless a power transferred from one branch is substantial or its retention essential to the 'separation of power' doctrine, there is no violation of Article IV, Section 4, of the constitution which provides the United States shall 'guarantee to every state in this union a Republican Form of Government.' " 198 N.W.2d at 356.

Applying these judicial treatments of the guaranty clause here, Circuit Court Clerks in Florida are county officers whose powers and duties are fixed by law. See Fla. Const. Art. II, §5(c) and Art. VIII, §1(d). Section 28.33 merely assigns a duty to Circuit Court Clerks with respect to registry deposits which come into their custody. No power, much less substantial power, has been taken from the judiciary through this statutory assignment of duties. In fact, the Florida Supreme Court in its decision below made clear that, had the Circuit Court initially ordered the interpleader funds to be held by the Receiver, no statutory direction otherwise could have prevented it from doing so under the Florida

Constitution's "Separation of Powers" doctrine. Accordingly, Section 28.33 has not "destroyed" the judicial branch of Florida government or denied the judiciary any of its essential authority in violation of the guaranty clause.

CONCLUSION

For the reasons stated this Court should dismiss this appeal or affirm the Florida Supreme Court's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellees in the cause above captioned, and a member of the Bar of the United States Supreme Court, hereby certify and affirm that all parties required to be served with the foregoing brief, including HARVEY M. ALPER, Massey, Alper, Wack & Eaton, 165 Whooping Loop, Altamonte Springs, Florida 32701, Attorney for Appellants, and to all other persons required to be served in accordance with the Supreme Court Rules.

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